Supreme Court, U.S.
FILED

No. 10- 101099 2011

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

PIERCE O'DONNELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

GEORGE J. TERWILLIGER III
Counsel of Record
DANIEL B. LEVIN
DANIEL T. BORK
WHITE & CASE LLP
701 13th Street N.W.
Washington, D.C. 20005
(202) 626-3600
gterwillger@whitecase.com
Counsel for Petitioner

March 7, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the conduct alleged in the Indictment dismissed by the district court—agreeing to reimburse and reimbursing campaign contributions made by contributors using their true names—violates a provision of the Federal Election Campaign Act (2 U.S.C. § 441f), which provides that "[n]o person shall make a contribution in the name of another person," where:

(a) the text of Section 441f makes no reference to indirect, "strawman," conduit, or intermediaries' contributions;

(b) 2 U.S.C. § 441a(a)(8) expressly permits and regulates contributions "made by a person, either directly or indirectly" and contributions "in any way earmarked or otherwise directed through an intermediary or conduit"; and

(c) the Ninth Circuit Court of Appeals' non-textual interpretation of a plainly-worded criminal prohibition regarding otherwise protected speech contravenes well-established First Amendment and due process principles, including the rule of lenity?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	9
I. The Court of Appeals' Ruling is Unsupported by the Plain Text of Sections 441f and 441a(a)(8) and is Contrary to Established Rules of Statutory Construction	12
A. The Express Language of Section 441f Does Not Encompass the "Conduit" Contributions Alleged in the Indictment	12
B. Well-Established Principles of Statutory Construction Further Compel the Conclusion that Section 441a(a)(8), not Section 441f, Governs "Conduit" Contributions	16
1. According Differing Language in Different Provisions of the Same Statute Differing Meanings	18
2. Avoiding Interpretations Rendering Portions of a Statute Superfluous	22

TABLE OF CONTENTS—Continued

Page

II. The Court of Appeals' Expansive Non-Textual Interpretation of Section 441f is Contrary to Due Process and First Amendment Principles 24

A. The FECA Regulates First Amendment Activities and Consequently Must be Interpreted so as to Avoid Chilling Protected Speech 24

B. Due Process Principles and the Rule of Lenity Require that Criminal Statutes be Interpreted Narrowly and Ambiguities be Resolved in Favor of the Defendant 27

CONCLUSION 31

APPENDIX

APPENDIX A: Opinion of the United States Court of Appeals for the Ninth Circuit..... 1a

APPENDIX B: Order of the Court of Appeals Denying Panel Rehearing and Rehearing *En Banc* 20a

APPENDIX C: Order of the Court of Appeals Granting Petitioner's Motion to Stay the Mandate 21a

APPENDIX D: Order of the United States District Court for the Central District of California Granting in Part and Denying in Part Defendant's Motion to Dismiss Indictment 22a

TABLE OF CONTENTS—Continued

Page

APPENDIX E: Indictment in the United States District Court for the Central District of California 37a

TABLE OF AUTHORITIES

CASES	Page
Almendarez-Torres v. United States, 523 U.S. 224 (1998)	13
Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002)	5, 14
Bates v. United States, 522 U.S. 23 (1997)	17
Bilski v. Kappos, 561 U.S. __, 130 S. Ct. 3218 (2010)	20
Buckley v. Valeo, 424 U.S. 1 (1976)	24, 25, 26
Caminetti v. United States, 242 U.S. 470 (1917)	14
Citizens United v. Federal Election Comm'n, 558 U.S. __, 130 S. Ct. 876 (2010)	14, 25, 26
Cleveland v. United States, 531 U.S. 12 (2000)	30
Connally v. General Constr. Co., 269 U.S. 385 (1926)	26
Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992)	20
Dodd v. United States, 545 U.S. 353 (2005)	14, 20
Duncan v. Walker, 533 U.S. 167 (2001)	17, 19
Fasulo v. United States, 272 U.S. 620 (1926)	28
Federal Commc'ns Comm'n v. AT&T Inc., 562 U.S. __ (2011)	15
Federal Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007)	25
Holder v. Humanitarian Law Project, 561 U.S. __, 130 S. Ct. 2705 (2010)	27
Jama v. Immigration and Customs Enforcement, 543 U.S. 335 (2005)	21
James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991)	14

TABLE OF AUTHORITIES—Continued

	Page
Johnson v. United States, 559 U.S. __, 130 S. Ct. 1265 (2010)	15
Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998)	17
Liparota v. United States, 471 U.S. 419 (1985)	29
McConnell v. Federal Election Comm'n, 540 U.S. 93 (2003)	14
McNally v. United States, 483 U.S. 350 (1987)	28-29
NAACP v. Button, 371 U.S. 415 (1963)	10, 28
Pavelic & LeFlore v. Marvel Entm't Group, 493 U.S. 120 (1989)	21
Randall v. Sorrell, 548 U.S. 230 (2006)	25
Ransom v. FIA Card Services, N.A., 562 U.S. __, 131 S. Ct. 716 (2011)	15
Reno v. American Civil Liberties Union, 521 U.S. 844 (1997)	10
Russell v. United States, 369 U.S. 749 (1962)	13
Russello v. United States, 464 U.S. 16 (1983)	17
Skilling v. United States, 561 U.S. __, 130 S. Ct. 2896 (2010)	30
TRW Inc. v. Andrews, 534 U.S. 19 (2001)	17
United States v. Boender, 691 F. Supp. 2d 833 (N.D. Ill. 2010)	14
United States v. Danielczyk, No. 11-cr-00085-JCC (E.D. Va. Feb. 16, 2011)	27
United States v. Geneske, No. 09-cr-00435-SDW (D.N.J. June 11, 2009)	27
United States v. Kanchanalak, 192 F.3d 1037 (D.C. Cir. 1999)	14

TABLE OF AUTHORITIES—Continued

Page

United States v. Kokinda, 497 U.S. 720 (1990) 24
United States v. Lanier, 520 U.S. 259 (1997) 29
United States v. Santos, 553 U.S. 507 (2008) 30
United States v. Serafini, 233 F.3d 758 (3d Cir. 2000) 14
Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980) 25
Watts v. United States, 394 U.S. 705 (1969) .. 26-27
Winters v. New York, 333 U.S. 507 (1948) ... 28

CONSTITUTION

U.S. Const. amend I ..... *passim*
U.S. Const. amend V ..... *passim*

STATUTES, LAWS, AND REGULATIONS

2 U.S.C. § 431 7
2 U.S.C. § 431(8)(A) 7, 12, 13
2 U.S.C. § 431(8)(A)(i) 21
2 U.S.C. § 431(8)(B) 7
2 U.S.C. § 431(9)(A) 22
2 U.S.C. § 437g(d) 4, 27
2 U.S.C. § 437g(d)(1) 4
2 U.S.C. § 437g(d)(1)(A) 4, 9
2 U.S.C. § 437g(d)(1)(D) 4, 9
2 U.S.C. § 441a 3, 8, 15, 21
2 U.S.C. § 441a(a)(1) 18, 19, 21, 25
2 U.S.C. § 441a(a)(8) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

2 U.S.C. § 441c(a)(1) 23
2 U.S.C. § 441e(a)(1) 23
2 U.S.C. § 441f ..... *passim*
28 U.S.C. § 1254(1) 2
Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) 12, 22
Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) 20
Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976) 20
Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980) 22
11 C.F.R. § 110.1(b)(6) 12
CAL. BUS. & PROF. CODE § 6102(a) 28

RULE

Sup. Ct. R. 10(c) 10

OTHER AUTHORITY

Reining in Overcriminalization: Assessing the Problems, Proposing Solutions, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 111th Cong. (Sept. 28, 2010) (Serial No. 111–151) 29
Brief *Amicus Curiae* of the Federal Election Commission, *United States v. O'Donnell*, No. 09-50296 (9th Cir. Sept. 23, 2009) 27

IN THE

Supreme Court of the United States

No. 10-__

PIERCE O'DONNELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Pierce O'Donnell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, dated June 14, 2010, is published at 608 F.3d 546. App. 1a-19a. The district court's order granting in part and denying in part Petitioner's motion to dismiss the Indictment, dated July 8, 2009, is unreported. App. 22a-36a. The opinions are reproduced in the Appendix.

JURISDICTION

The court of appeals entered judgment on June 14, 2010. App. 1a. It denied Petitioner's timely petition for panel rehearing and petition for rehearing en banc on December 6, 2010. App. 20a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The Fifth Amendment to the U.S. Constitution provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

Section 441f of Title 2 of the United States Code provides:

> No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

Section 441a(a)(8) of Title 2 of the United States Code provides:

> For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such can-

didate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

STATEMENT OF THE CASE

On July 24, 2008, a grand jury returned a three-count Indictment against Petitioner Pierce O'Donnell. The Indictment alleged that between February and April 2003, Petitioner, using his own name, "reimbursed" completed "contributions" that other individuals made in their own names to EFP, an authorized political committee of a candidate for Federal office.[1] App. 39a-43a. According to the Indictment, Petitioner allegedly solicited thirteen individuals to contribute to EFP. App. 42a-43a. These individuals each provided to EFP a contribution of $2,000 using their own names, and Petitioner, by checks in his name, subsequently reimbursed them in the amount of their contributions. App. 40a-43a.

The Indictment charged Petitioner with violating a provision of the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 441f[2] (Count II), conspiracy to violate Section 441f (Count I), and false statements related to campaign contributions (Count III). App. 39a-44a.

---

[1] As recognized by the court of appeals, "EFP" as used in the Indictment refers to the Edwards for President committee. *See* App. 3a.

[2] "Section 441f" refers to 2 U.S.C. § 441f (2000), "Section 441a(a)(8)" refers to 2 U.S.C. § 441a(a)(8) (2000), and "Section 441a" refers to 2 U.S.C. § 441a. References to Title 2 are to the 2000 United States Code, as amended through Supplement II, unless otherwise noted.

More specifically, the Indictment alleged that Petitioner and an unindicted co-conspirator "conspired and agreed to make conduit contributions that aggregated more than $10,000 within a calendar year, that is, contributions in the names of others, in violation of 2 U.S.C. §§ 437g(d)[3] and 441f." App. 40a. Petitioner allegedly "would solicit individuals to make contributions to EFP, and would inform such individuals that

---

[3] In relevant part, 2 U.S.C. § 437g(d)(1) provides:

> (A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure—
>
> (i) aggregating $25,000 or more during a calendar year shall be fined under Title 18, or imprisoned for not more than 5 years, or both; or
>
> (ii) aggregating $2,000 or more (but less than $25,000) during a calendar year shall be fined under such title, or imprisoned for not more than 1 year, or both.
>
> . . .
>
> (D) Any person who knowingly and willfully commits a violation of section 441f of this title involving an amount aggregating more than $10,000 during a calendar year shall be—
>
> (i) imprisoned for not more than 2 years if the amount is less than $25,000 (and subject to imprisonment under subparagraph (A) if the amount is $25,000 or more);
>
> (ii) fined not less than 300 percent of the amount involved in the violation and not more than the greater of—
>
> (I) $50,000; or
>
> (II) 1,000 percent of the amount involved in the violation; or
>
> (iii) both imprisoned under clause (i) and fined under clause (ii).

2 U.S.C. §§ 437g(d)(1)(A), (D).

he would reimburse their contributions." *Id.* Petitioner and an unindicted co-conspirator allegedly "would collect and receive contributions to EFP from the individuals who they solicited (hereafter the 'conduit contributors') and cause their contributions to be received by EFP." *Id.* In addition, Petitioner allegedly "would sign bank checks drawn on the account of defendant O'Donnell reimbursing the conduit contributors for their contributions to EFP." *Id.* The Indictment does not allege that Petitioner used any name other than his own when providing reimbursement subsequent to the making of the contributions by others in their own names. App. 37a-44a.

After briefing and argument, the district court dismissed Counts One and Two of the Indictment.[4] App. 36a. The district court held that Petitioner's alleged conduct of reimbursing individuals for contributions made by those individuals in their true names "does not fall within the ambit of § 441f." App. 31a. The district court reasoned:

> [I]f Congress intended § 441f to apply to indirect contributions, or contributions made through a conduit or intermediary, it would have included explicit language, as it did in the other sections of the same statute. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. at 452. Moreover, if § 441f covered "conduit" and "indirect" contributions, there would be no need for Congress to have explicitly included those terms in other sections of FECA.

---

[4] Count Three, which is not at issue in this Petition, was dismissed without prejudice on the government's motion. *See* Order Dismissing Count Three Without Prejudice, *United States v. O'Donnell*, No. 08-CR-00872-SJO (C.D. Cal. June 29, 2009).

App. 25a-26a. The district court concluded "the statute is unambiguous in light of its plain language, structure, and legislative history." App. 28a. The district court further stated: "However, assuming it remained ambiguous after such analyses, the rule of lenity would require the Court to interpret § 441f in O'Donnell's favor." *Id.*

The court of appeals reversed, holding that Section 441f "prohibits a person from providing money to others to donate to a candidate for federal office in their own names, when in reality they are merely 'straw donors.'"[5] App. 2a. In doing so, the court of appeals held that the language of Section 441f "*unambiguously* applies to a defendant who solicits others to donate to a candidate for federal office in their own names and either advances the money or promises to — and does — reimburse them for the gifts." App. 17a (emphasis added).[6] In reaching the conclusion that the text of the statute "unambiguously" so applied, the court reasoned on the basis of a dictionary definition of the term "contribute,"

---

[5] Although the Indictment repeatedly refers to "conduit" contributions and "conduit" contributors, the term "straw donor" does not appear in it. *See* App. 37a-44a.

[6] The terms "conduit," "straw donor," and "reimbursement" appear nowhere in the text of Section 441f, the statute under which Petitioner was charged. In addition, although the Indictment quotes the statutory language addressing advances, the Indictment factually alleges only reimbursements, not advances. App. 37a-44a. Thus, this Petition does not raise, and this Court need not consider, whether the result might be different if an individual provided funds to third parties who then passed those funds on to the campaign.

App. 7a-8a, although the term "contribution" as used in Section 441f is defined in the statute.[7]

The court of appeals held that the text, context, purpose, and structure of the statute favored the government's application of Section 441f to Petitioner's alleged conduct. App. 6a-18a. First, the court of appeals considered the definition of "contribution" set forth in FECA. App. 7a. Because, according to the appeals court, the FECA definition of contribution did not address "the salient question of *who* made the contribution," *id.* (emphasis original), the court consulted a dictionary definition and concluded that "the plain language of § 441f itself . . . encompasses straw donor contributions," App. 10a, despite the fact neither the text of Section 441f nor the applicable statutory definition of a "contribution" contains any reference to "straw donors" or "conduits."

Second, the court of appeals disagreed with the district court's reasoning that the absence of language in or applicable to Section 441f defining contributions made "either directly or indirectly" and

---

[7] Section 431 states: "When used in this Act: . . .

(8)(A) The term "contribution" includes—

(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or

(ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

2 U.S.C. § 431(8)(A) (2000). Although not relevant to the issues presented in this Petition, 2 U.S.C. § 431(8)(B) sets forth a variety of payments or services that are not included in FECA's definition of "contribution." *See* 2 U.S.C. § 431(8)(B).

"otherwise directed through an intermediary or conduit" and the inclusion of that language in the specialized definition of contribution for purposes of Section 441a had to be viewed as a purposeful distinction by Congress. App. 10a-14a; *see* App. 24a-27a (district court's analysis of the interplay between Sections 441a(a)(8) and 441f).

Third, the court of appeals consulted the legislative history of the Federal Election Campaign Act of 1971. The government had conceded that there is no relevant contemporary legislative history regarding Section 441f. Government's Opening Brief at 47, *United States v. O'Donnell*, No. 09-50296 (9th Cir. Sept. 14, 2009) ("The government has found no relevant discussion of now-Section 441f in the 1971 Act's legislative history . . . ."). Nevertheless, the court of appeals, referencing post-adoption legislative activity and the government's and *amicis*' views on the objectives of the statute, ruled that the legislative history supported the prosecutors' interpretation of Section 441f. App. 14a-16a. The court of appeals acknowledged that the interpretation "result[s] in an overlap in FECA's present structure," but nevertheless decided that the "structure" of Section 441f also supported its conclusion. App. 16a-17a.

Finally, because the court of appeals ruled that Section 441f was "unambiguous[]" it held that the rule of lenity did not apply. App. 17a-18a. The court of appeals did not address the impact of any First Amendment considerations on its statutory construction, an issue which was properly raised and preserved below.[8]

---

[8] *See, e.g.*, Brief of Defendant-Appellee at 49-52, *United States v. O'Donnell*, No. 09-50296 (9th Cir. Nov. 9, 2009) (addressing

The court of appeals also rejected Petitioner's claim that the Indictment filed against him was defective "because it charges him with reimbursing contributions made by others rather than with making contributions himself." App. 18a. Although "allegations that [Petitioner] reimbursed the contributions of others[] alone might not clearly state a legal violation," the court of appeals found the Indictment was sufficient because it "reasonably describe[d] reimbursements as the particular method used to violate the ban on contributing in the name of others." App. 18a-19a.[9]

REASONS FOR GRANTING THE PETITION

Certiorari is warranted to correct the court of appeals' erroneous ruling in construing a criminal statute relating to political speech, especially

---

the impact of First Amendment concerns on the interpretation of criminal statutes and stating that "Section 441f must be narrowly interpreted so as to limit the restrictions on constitutionally-protected speech to the text of the statute").

[9] The court of appeals' conclusion as to the sufficiency of the Indictment was erroneous. Under the court of appeals' interpretation of Section 441f, a violation does not occur if the "straw donor" reports the original source of the funds. *See* App. 4a-5a (describing a "straw donor contribution" as one in which the straw donor transmits funds in the straw donor's name). Only knowing violations of Section 441f are crimes, *see* 2 U.S.C. §§ 437g(d)(1)(A), (D), but the Indictment does not allege that Petitioner had knowledge that the "straw donors" would fail to report—as they are required by law to do—Petitioner as the original source (if he was or so became) of the contributions described in the Indictment. Thus, even under the court of appeals' construct of Section 441f, the decision to reverse the district court's dismissal was an error because the Indictment fails to factually allege an essential element of the offenses charged.

where it threatens to have a chilling effect beyond Petitioner's case. If criminal provisions in FECA are given interpretations that are not only unsupported—but actually contradicted—by express statutory language and well-established principles of statutory construction, then the threat to constitutionally protected political activity will be substantial.[10]

Moreover, criminal statutes are not elasticized enforcement authority that prosecutors or courts may stretch at will. They are instead confined to their textual proscriptions and, if ambiguous, are to be interpreted in favor of the accused. The decision of the court of appeals exceeds the textual limits of Section 441f's proscriptions and thereby improperly rewrites a criminal statute. Moreover, the court of appeals' decision fails to account for the obvious import of another section of FECA, Section 441a (a)(8), which was properly considered and relied upon by the district court when it concluded that Petitioner's conduct was beyond the reach of Section 441f.

The flaw in the court of appeals' reasoning on the interplay of the two statutory provisions is readily

---

[10] *See* Sup. Ct. R. 10(c) (stating that certiorari may be granted when "a United States court of appeals has decided an important question of federal law . . . in a way that conflicts with relevant decisions of this Court"). *See NAACP v. Button*, 371 U.S. 415, 433 (1963) ("These [First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.") (citations omitted); *see also Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997) (noting risk that vague statutes may chill protected expression).

apparent. Section 441f states an absolute prohibition—the making of a campaign contribution in the name of another is prohibited without exception. In contrast, Section 441a(a)(8) regulates and controls, but does not prohibit, conduit contributions. Thus, as even the government admitted below, the court of appeals' ruling allows prosecutors to deem some, but not all, conduit contributions to be criminal violations under Section 441f. The difference, according to the government below, is that conduit contributions reported and within individual contribution limits would not violate Section 441f, but those not meeting these, or presumably other, regulatory requirements are fair game for a Section 441f prosecution. The text of Section 441f provides no basis for such distinctions. In addition, this construct results in the untenable circumstance where the culpability of the original source for a Section 441f violation turns on whether a third party—the actual contributor—makes a report required under an entirely different section of the statute.

The court of appeals' ruling upends Congress' carefully tailored statutory distinctions in Sections 441f and 441a(a)(8) governing conduct subject to First Amendment protections. Thus, the appeals court's opinion ignores well-established principles of statutory construction, long-standing rules concerning the need to narrowly construe criminal statutes impinging on core First Amendment values, and settled law regarding due process considerations and the application of the rule of lenity when construing ambiguity in criminal statutes. Certiorari is justified by these errors, especially where the opinion below will provide precedential support to similar judicial rewriting of narrowly tailored congressional enact-

ments criminalizing conduct within the sphere of protected First Amendment activity.

I. The Court of Appeals' Ruling is Unsupported by the Plain Text of Sections 441f and 441a(a)(8) and is Contrary to Established Rules of Statutory Construction.

A. The Express Language of Section 441f Does Not Encompass the "Conduit" Contributions Alleged in the Indictment.

According to the Indictment, at the time the alleged "contributions" in question were made, the only financial transactions that had taken place were by persons other than Petitioner providing money to EFP using their own names.[11] The Indictment does not allege that the individuals who submitted the

---

[11] Thus, the act of "making the contribution," an essential element of the offenses charged, was complete before the Petitioner is alleged to have done anything with his own funds. Implementing regulations promulgated by the Federal Election Commission make clear that a contribution is "made" when the donor "relinquishes control over the contribution." 11 C.F.R. § 110.1(b)(6). Petitioner's alleged promise to reimburse the contributions made is clearly not within the relevant statutory definition of a "contribution." The definition of "contribution" provided in the FECA at the time of events alleged in the Indictment did not include "promise[s]," a material exclusion because earlier versions of FECA did define "contributions" to include "promise[s]." *Compare* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 301(e)(2), 86 Stat. 3, 12 (1972) (defining "contribution" to include "a contract, promise, or agreement, whether or not legally enforceable, to make a contribution for any such purpose"), *with* 2 U.S.C. § 431(8)(A), *supra* note 7 (definition of "contribution," as amended by Acts subsequent to the original enactment of FECA, which no longer includes "promise[s]").

contributions to EFP did so using anything other than their own names.[12]

In pertinent part, Section 441f states: "No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution . . . ." The text of Section 441f does not address reimbursement of "conduit contributions," "straw donors," or the conduct of any intermediaries in a chain of events involving a contribution by a person using their true name. Rather, the text prohibits only an individual from making a contribution in other than his or her own name. Likewise, the statutory definition of a "contribution" applicable to Section 441f nowhere includes direct or indirect or conduit contributions.[13]

---

[12] To the extent that the government's allegation is that Petitioner's reimbursement provided to those third parties was the "contribution," this after-the-fact theory results in a fatally defective indictment where the facts alleged are at variance with the elements of the offense charged. In order to be valid, "[a]n indictment must set forth each element of the crime that it charges," *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998) (citation omitted), and "be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *Russell v. United States*, 369 U.S. 749, 765 (1962) (citation and internal quotation marks omitted). Moreover, the Indictment alleges that the reimbursements in question were made using Petitioner's own name (reimbursement checks drawn on his account). App. 40a-42a. Thus, the "contribution" Petitioner is alleged to have made after the fact of the contributions identified were made in his true name.

[13] *See supra* note 7 (quoting the definition of "contribution" provided in 2 U.S.C. § 431(8)(A)).

There simply is no basis in the text of Section 441f for concluding that a so-called "conduit contribution" made by a so-called "conduit contributor" using his or her true name is a "contribution in the name of another."[14] "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Dodd v. United States*, 545 U.S. 353, 359 (2005) (citation and internal quotation marks omitted) (alteration original); *see Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) ("As in all statutory construction cases, we begin with the language of the statute. . . . The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and constituent.") (citation and internal quotation marks omitted); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.") (citation omitted). Otherwise, congressional intent is supplanted by undemocratic judicial legislation. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) ("[Judicial power] must be deemed to be the judicial power as understood by our common-law

---

[14] Another district court has determined that Section 441f applies to conduit or indirect contributions. *See United States v. Boender*, 691 F. Supp. 2d 833, 838-42 (N.D. Ill. 2010). Various other courts have assumed the same in dicta without analyzing the issue. *See, e.g., McConnell v. Federal Election Comm'n*, 540 U.S. 93, 232 (2003), *overruled on other grounds by Citizens United v. Federal Election Comm'n*, 558 U.S. __, __, 130 S. Ct. 876, 913 (2010); *United States v. Serafini*, 233 F.3d 758, 763 n.5 (3d Cir. 2000); *United States v. Kanchanalak*, 192 F.3d 1037, 1042 (D.C. Cir. 1999).

tradition. That is the power to say 'what the law is,' not the power to change it.") (citation omitted).

In concluding that Section 441f prohibits conduit contributions, the court of appeals necessarily had to reach beyond the text of Section 441f and the definition of the "contributions" referenced therein. It did so by both going beyond the text of Section 441f and the statutory definition of what constitutes a contribution and holding that the statute includes expansive acts of involvement in making a contribution based on a common dictionary definition of the term "contribute." Dictionary definitions are properly used to give words in a statute their ordinary meaning, not to expand or contradict statutory definitions. *See Federal Commc'ns Comm'n v. AT&T Inc.*, 562 U.S. __, __ (2011) (slip op., at 5) ("'Person' is a defined term in the statute; 'personal' is not. When a statute does not define a term, we typically 'give the phrase its ordinary meaning.'") (citing *Johnson v. United States*, 559 U.S. __, __, 130 S. Ct. 1265, 1270 (2010)); *Ransom v. FIA Card Services, N.A.*, 562 U.S. __, __, 131 S. Ct. 716, 724 (2011) (consulting dictionary definition of key term in statute at issue "[b]ecause the Code does not define 'applicable'"). The court of appeals' resort to extrinsic aids to interpret the statute is inconsistent with fundamental principles that require courts to first adhere to the plain text of statutes. Here, the plain text of the statutory definitions of "contribution" applicable to Section 441f and that applicable to Section 441a not only fail to justify the resort to a dictionary definition, but contradict the expansive dictionary definition relied upon by the court of appeals.

But were it appropriate to consult other sources for statutory interpretation, they only reinforce the conclusion that Section 441a(a)(8), not Section 441f, governs the conduct alleged in the Indictment.[15]

B. Well-Established Principles of Statutory Construction Further Compel the Conclusion that Section 441a(a)(8), not Section 441f, Governs "Conduit" Contributions.

In its effort to justify ignoring the plain statutory language, the court of appeals disregarded two well-established rules of statutory construction: the rule that different language in different provisions of the same statute is presumed to have different meanings, and the rule against interpreting a statute in a

---

[15] While the government's motive in making its charging decision is not determinative of the issue in the case, it is relevant to note that the government charged a felony, which applies under Section 441f as long as the amount involved exceeds $10,000 (as charged in the Indictment), but which would not apply under Section 441a(a)(8) unless the amount involved exceeds $25,000 (although the Indictment in fact describes $26,000 in "conduit contributions," Count II only alleges contributions in excess of $10,000, and a failure of proof on any one of the thirteen alleged conduit contributions would cause the government to fail to prove a felony under Section 441a(a)(8), perhaps further explaining the charging decision). App. 42a-43a.

Similarly, the government's assertion that it would make no sense to limit Section 441f to cases where an individual makes a contribution using a false name is simply incorrect: It does more harm to the transparency of the campaign finance reporting system if an individual uses a false name, which might well never be detected, than if an individual reimburses a contribution, where the party receiving the reimbursement has a statutory obligation to report that fact, *see* 2 U.S.C. § 441a(a)(8), thereby providing a clear means for identification and disclosure of the source of "conduit" contributions.

manner that renders portions of it superfluous. Section 441a(a)(8) contains a definition of "contribution," expressly limited to that section, that encompasses "conduit" contributions. By, in effect, applying that definition to Section 441f—where a different statutory definition applies—the court of appeals both ignored the material differences in statutory language between those two sections and rendered the additional language in Section 441a(a)(8) superfluous by concluding that it was already encompassed within the general statutory term "contribution."

Courts must account for a statute "in all its parts," including the impact of an interpretation on related provisions of the same statute. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 36 (1998). In particular, this Court has explained that "[i]t is well settled that '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Duncan v. Walker*, 533 U.S. 167, 173 (2001) (citing *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))) (internal quotation marks omitted). This Court has also repeatedly made clear that courts should wherever possible interpret statutory provisions so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation and internal quotation marks omitted). The court of appeals' construction of Sections 441f and 441a(a)(8) not only is inconsistent with these cardinal principles, but examination of the two relevant statutory provisions compels the conclusion that the district court reached: Section 441a(a)(8) reaches the reim-

bursements alleged in the Indictment, while Section 441f does not.

1. According Differing Language in Different Provisions of the Same Statute Differing Meanings

Section 441a(a)(8) states:

> **For purposes of the limitations imposed by this section**, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

2 U.S.C. § 441a(a)(8) (emphasis added). This FECA provision unmistakably permits conduit contributions, but regulates them by requiring the person tendering the funds to a covered campaign committee to identify the original source of any funds not the contributor's own. Another part of the statute limits the total amount of funds any one individual can contribute to one candidate. *See* 2 U.S.C. § 441a(a)(1).

Thus, these provisions and Section 441f can be read harmoniously with FECA's fundamental purpose as identified by the court of appeals (and numerous *amicus* filings below): transparency in the identification of those making campaign contributions and limits on the expenditures of any individual for that purpose. *See* App. 14a-16a. Section 441a(a)(8) allows persons to solicit, bundle, and tender the campaign

contributions of others but requires the original source to be named; Section 441a(a)(1) sets contributions limits for any individual. Section 441f outright proscribes making a contribution in the name of another (by, for example, an individual making a series of contributions with a list of fictitious names plucked out of a telephone directory). Each section of the statute serves a common objective—ensuring accurate disclosure of the identity of contributors—and violation of each carries sanctions for wrongdoers.

The court of appeals' analysis, however, of the interplay between Section 441f and the other relevant FECA provisions not only reaches far beyond the textual limits of Section 441f, it also ignores the impact and import of the other relevant sections. In stark contravention to well-established principles of statutory construction, the court of appeals found that the text of Section 441f "unambiguously" encompasses "straw donor contributions." App. 5a. It found that the absence of "directly or indirectly" and any reference to contributions "directed through an intermediary or conduit" in Section 441f did not indicate an intent to exclude application of those words in Section 441f, despite Congress' express inclusion of those words in Section 441a(a)(8) and omission of them in Section 441f. App. 12a.

That ruling was erroneous because this Court has repeatedly instructed courts to "generally presume[] that Congress acts intentionally and purposely in the disparate inclusion and exclusion" of language in statutes. *Duncan*, 533 U.S. at 173 (citations and internal quotation marks omitted).[16]

---

[16] A simple hypothetical illustrates why this rule maintains force in the context of this case: if a "conduit" contribution is a

The court of appeals also opined that the text of Section 441a(a)(8) did not preclude "contribution," as used in Section 441f, from encompassing indirect or conduit contributions because "Congress enacted § 441f and § 441a(a)(8) at different times," App. 11a, and "the language used in § 441f is broad rather than specific." App. 12a. But the court of appeals must "'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *Dodd*, 545 U.S. at 357 (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)) (alteration original). Moreover, even though Congress initially enacted Section 441a(a)(8) after Section 441f, it re-enacted Section 441f when Section 441a(a)(8) was initially enacted and subsequently re-enacted both provisions simultaneously. *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263, 1263-68 (1974); Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112, 90 Stat. 475, 486-96 (1976). Thus, the presumption should apply with full force as it does with simultaneously-enacted provisions. *See Bilski v. Kappos*, 561 U.S. __, __, 130 S. Ct. 3218, 3228-29 (2010) (discussing the "canon against interpreting any statutory provision in a manner that

---

"contribution in the name of another" as the court of appeals held, then it is absolutely prohibited by Section 441f, which contains no exceptions. But Section 441a(a)(8) clearly permits some conduit contributions. So long as the original source reporting requirements and individual contributions limits are observed, hypothetically an individual could solicit and advance or reimburse ten individuals each who give $100 to a campaign and that conduct would be lawful pursuant to Section 441a(a)(8). The court of appeals' decision is silent as to how "conduit" contributions can be simultaneously prohibited by Section 441f and permitted and regulated under Section 441a(a)(8).

would render another provision superfluous" and stating "[t]his principle, of course, applies to interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times") (citations omitted).

Section 441a(a)(8) demonstrates that Congress was capable of drafting (and did draft) language covering the conduct alleged to have been Petitioner's in this case: namely, exceeding the individual contribution limits through "indirect" contributions by reimbursing "conduit" contributors. Under Section 441a(a)(8), any such reimbursed contributions are aggregated as part of the "original source's" total contributions and, if that total exceeds the amount permitted by Section 441a(a)(1), the conduct would violate FECA.

Despite the clear difference in language between the Sections, the court of appeals effectively applied the specialized definition of "contribution" in Section 441a(a)(8), a definition explicitly limited to "the limitations imposed by this section" (Section 441a), to Section 441f. Such judicial amendment of the statute is plainly impermissible. *See Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S. 120, 126 (1989) (A court's "task is to apply the text, not to improve upon it.").[17] An interpretation which ignores these

---

[17] As noted above, FECA defines "contribution" as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). Notably, this definition of "contribution" in FECA, which applies to Section 441f, does not include "direct or indirect" contributions, and the court of appeals' interpretation improperly expands upon the definition adopted by Congress. *See Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our

significant differences in statutory language of different provisions of the same statute cannot be correct, especially where the alternative construction advanced by the district court properly reflects the relevant differences in statutory terms.

2. Avoiding Interpretations Rendering Portions of a Statute Superfluous

Because Section 441a(a)(8) has a particularized definition of contribution that does not apply to Section 441f, the court of appeals' interpretation of the definition that does apply to Section 441f as including by implication the Section 441a(a)(8) definition renders the latter superfluous. Section 441a(a)(8) states:

> For purposes of the limitations imposed by this section, all contributions made by a person, **either directly or indirectly**, on behalf of a

---

reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest."). Nor does the general definition of "contribution" include "promise," if somehow the government were now to argue that it was Petitioner's alleged promise to reimburse that was the contribution—an omission that is clearly intentional given that FECA's definition of "expenditure," but not of "contribution," does include a "written contract, promise, or agreement" to make an expenditure. 2 U.S.C. § 431(9)(A) (2000). In fact, the statutory definition of "contribution" previously included "promise[s]" to make contributions, but that language was dropped when the statute was amended in 1980. *Compare* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 301(e)(2), 86 Stat. 3, 12 (1972) (defining "contribution" to include "a contract, promise, or agreement, whether or not legally enforceable, to make a contribution for any such purpose"), *with* Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 101, 93 Stat. 1339, 1340-42 (1980) (amending definition of "contribution" and discarding provision of earlier definition that encompassed "promise[s]").

> particular candidate, **including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate.** The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

2 U.S.C. § 441a(a)(8) (emphasis added). If the mere word "contribution" as used in Section 441f encompassed "direct and indirect" contributions, "conduit" contributions, and contributions "in any way earmarked or otherwise directed through an intermediary," then all of the highlighted language above in Section 441a(a)(8) is superfluous, as it would already have been covered by the general statutory definition of "contribution."

Moreover, the court of appeals' conclusion that the use of the term "contribution" in Section 441f encompasses both "direct and indirect" contributions would render superfluous Congress' use of "direct and indirect" in other FECA provisions that explicitly address "direct and indirect" transfers or contributions.[18]

An interpretation which renders so many provisions of FECA superfluous cannot be proper, especially when there is an alternative logical

---

[18] The FECA uses "directly and indirectly" in other provisions describing contributions and payments. *See, e.g.*, 2 U.S.C. § 441e(a)(1) (prohibiting foreign nationals from making contributions "directly or indirectly"); 2 U.S.C. § 441c(a)(1) (2000) (prohibiting government contractors from "directly or indirectly . . . mak[ing] any contribution of money or other things of value" to political parties, committees, or candidates).

interpretation faithful to the plain language which gives full meaning to the statutory language.

II. The Court of Appeals' Expansive Non-Textual Interpretation of Section 441f is Contrary to Due Process and First Amendment Principles.

A. The FECA Regulates First Amendment Activities and Consequently Must be Interpreted so as to Avoid Chilling Protected Speech.

Far from giving Section 441f the narrow reading that is required where a criminal statute regulates conduct at the very core of the First Amendment, the court of appeals gave it an expansive reading at odds with its express language and established principles of statutory construction.

Contributing to political campaigns, including soliciting campaign contributions, is constitutionally-protected activity under the First Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("The [Federal Election Campaign] Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities."); *see also United States v. Kokinda*, 497 U.S. 720, 725 (1990) ("Solicitation is a recognized form of speech protected by the First Amendment.") (citations omitted). Much of the Petitioner's conduct as alleged in the Indictment is entirely lawful, including soliciting others to make political contributions. The law also does not forbid reimbursing the contributions of others *per se*, so long as the original source of such funds is reported (and that reporting duty is on the contributor tendering the funds to the political committee) and individual

contribution limits are observed.[19] Thus, because solicitation and contributions are in the sphere of constitutionally-protected activity, judicial construction of the statute in question must respect bedrock notions of First Amendment jurisprudence. The court of appeals did not address these principles and its holding flatly contravenes them.[20]

It is axiomatic that controls and limitations imposed by Congress on political speech activities and campaign contributions implicate "the freedoms of 'political expression' and 'political association.'" *Randall v. Sorrell*, 548 U.S. 230, 246 (2006) (plurality opinion) (quoting *Buckley*, 424 U.S. at 15, 23); *see Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 633 (1980) ("Our cases have long protected speech even though it is in the form of . . . a solicitation to pay or contribute money.") (alterations to original and internal quotation marks omitted). When Congress enacts legislation impinging on these constitutionally-protected activities, the statute must both "'further[] a compelling interest and [] [be] narrowly tailored to achieve that interest.'" *Citizens United*, 130 S. Ct. at 898 (quoting *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (opinion of Roberts, C.J.)). The same

---

[19] Exceeding such limits is a criminal offense separate from Section 441f, *see* 2 U.S.C. § 441a(a)(1), which the government elected not to charge in this case. App. 37a.

[20] Despite Petitioner raising First Amendment concerns in his brief, *see supra* note 8, the court of appeals did not discuss the First Amendment considerations implicated by Section 441f in its opinion. App. 1a-19a. Rather, the court of appeals concluded that Section 441f was unambiguous without considering the First Amendment issues implicated by its decision (and, as discussed in Part II.B, *infra*, only briefly addressed due process and rule of lenity considerations). App. 17a-18a.

constraints must inform judicial interpretation of such enactments.

Vague terms present a particularly acute danger that a statute regulating political speech will impinge upon an individual's First Amendment rights and stifle speech. *See Citizens United*, 130 S. Ct. at 889 ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'") (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)) (alteration original). Any ambiguity in a statute regulating protected First Amendment activity should be resolved in a defendant's favor to avoid an inappropriate chilling effect on constitutionally-protected political activities. *See Citizens United*, 130 S. Ct. at 891 ("First Amendment standards . . . 'must give the benefit of any doubt to protecting rather than stifling speech.'") (citation omitted); *Buckley*, 424 U.S. at 40-41, 77-78.

Rather than apply these principles to the interpretation of Section 441f, the court of appeals ignored them and instead adopted an expansive, non-textual reading of the statute that introduces the very vagueness and uncertainty that these principles are designed to curb. The failure of the court of appeals to adequately consider the First Amendment protections of political speech in interpreting Section 441f is an error that threatens political speech far more broadly than this particular case and that warrants certiorari. *See Watts v. United States*, 394

U.S. 705, 707 (1969) (per curiam) ("[A] statute . . . , which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind.").[21]

B. Due Process Principles and the Rule of Lenity Require that Criminal Statutes be Interpreted Narrowly and Ambiguities be Resolved in Favor of the Defendant.

Due process principles require that a criminal statute like Section 441f proscribe the conduct for which an individual may be criminally penalized in terms that "provide a person of ordinary intelligence fair notice of what is prohibited." *Holder v. Humanitarian Law Project*, 561 U.S. __, __, 130 S. Ct. 2705, 2718 (2010) (citation and internal quotation marks omitted).[22] Because nothing in the terms of Section

---

[21] The government has charged such "conduit" contributions as violations of Section 441f on numerous occasions both before and since the court of appeals' decision in this case. *See, e.g.*, Indictment, *United States v. Danielczyk*, No. 11-cr-00085-JCC (E.D. Va. Feb. 16, 2011) (charging two individuals with violating, among other statutes, Section 441f based on allegations of conduit contributions); Information, *United States v. Geneske*, No. 09-cr-00435-SDW (D.N.J. June 11, 2009) (charging defendant with violating Section 441f for allegedly reimbursing or advancing funds to "straw donors" for their contributions). *See generally* Brief *Amicus Curiae* of the Federal Election Commission at 10 n.4, *United States v. O'Donnell*, No. 09-50296 (9th Cir. Sept. 23, 2009) (listing criminal judgments obtained by the U.S. Department of Justice alleging violations of Section 441f based on "concealed conduit-contribution schemes").

[22] The FECA imposes significant criminal penalties on persons that violate Section 441f. Based on the allegations in the Indictment, Petitioner faces a significant prison term and fine, *see* 2 U.S.C. § 437g(d), and a conviction, even prior to final

441f conveys to a person of ordinary intelligence that its proscription, as the court of appeals defined it, extends to "straw donor contributions, in which a defendant solicits others to donate . . . and furnishes the money for the gift either through an advance or a prearranged reimbursement," the court of appeals' ruling contravenes these principles. App. 19a.

Due process principles concerning the application of criminal statutes are especially relevant when the conduct covered by a criminal provision involves activity within the sphere of First Amendment protections. *See Button*, 371 U.S. at 438 ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."); *Winters v. New York*, 333 U.S. 507, 509-10 (1948) ("A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment violates an accused's rights under procedural due process and freedom of speech or press.").

More generally, as this Court explained in *McNally v. United States:*

> [W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. . . . "*There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute.*" *Fasulo v. United States*, 272 U.S. 620, 629 (1926).

---

judgment, would result in the suspension of Petitioner's license to practice law. CAL. BUS. & PROF. CODE § 6102(a).

483 U.S. 350, 359-60 (1987) (citations omitted) (emphasis added).

The rule of lenity ensures that these principles are observed.[23] *See United States v. Lanier*, 520 U.S. 259, 265-66 (1997) (describing "three related manifestations of the fair warning requirement" of the "right to due process," including "the canon of strict construction of criminal laws, or rule of lenity, [which] ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.") (citations omitted); *Liparota v. United States*, 471 U.S. 419, 427 (1985) ("Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legisla-

---

[23] The importance of the rule of lenity as a means of protecting individual rights was among the subjects covered during a recent congressional hearing on the subject of overcriminalization. As noted by Representative Scott, the September 28, 2010, hearing was "supported by a [] broad group of organizations." *Reining in Overcriminalization: Assessing the Problems, Proposing Solutions*, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 111th Cong. 2 (Sept. 28, 2010) (Serial No. 111–151) (statement of Rep. Scott, Chairman, H. Subcomm. on Crime, Terrorism, and Homeland Security). Representative Scott also noted: "We can see the impact of the unfair and vague legislation at the hands of overzealous prosecutors when we look at the prison population." *Id.* Moreover, a report filed in connection with testimony at the hearing described "federal criminal offenses [as] frequently drafted without the clarity and specificity that have traditionally been required for the imposition of criminal liability" and "[d]espite the Supreme Court's statements of [the rule of lenity's] importance, the rule has not been uniformly or consistently applied by the lower federal courts." *Id.* at 52, 57 (statement of Brian W. Walsh, Senior Legal Research Fellow, the Heritage Foundation).

ture, the prosecutor, and the court in defining criminal liability.") (citation omitted).

This "familiar principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,'" *Skilling v. United States*, 561 U.S. __, __, 130 S. Ct. 2896, 2932 (2010) (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000)), was not applied by the court of appeals in this case. Instead, it ruled that because Section 441f "unambiguously" prohibits the conduct alleged in the Indictment, the rule of lenity was not implicated. App. 17a-18a. The court of appeals reached the conclusion that the statutory text was unambiguous despite its resort to extrinsic materials to interpret the statute, and its acknowledgement that the interpretation it adopted "result[s] in an overlap in FECA's present structure." App. 16a. Because the court of appeals' ruling necessarily involved resolution of ambiguity in the terms of Section 441f, it was error for it to resolve that ambiguity against the Petitioner. *See United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.") (citations omitted); *id.* at 519 ("We interpret ambiguous criminal statutes in favor of defendants, not prosecutors.").

As detailed above, the plain language of the relevant FECA provisions and well-established rules of statutory interpretation compel the conclusion that Section 441a(a)(8) and not Section 441f governs the lawful parameters of indirect political contributions involving conduits or intermediaries. At the very least, in light of those considerations, there is ambiguity as to whether Section 441f prohibits reimbursement of "conduit contributions" made in the

true name of the "conduit." Due process and the rule of lenity require that any such ambiguity be resolved in Petitioner's favor. The court of appeals' failure to follow these well-established principles, especially in the context of political speech, has implications that reach far beyond Petitioner's case and justify granting certiorari to review and correct the decision below and the erroneous approach it embodies.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE J. TERWILLIGER III
Counsel of Record
DANIEL B. LEVIN
DANIEL T. BORK
WHITE & CASE LLP
701 13th Street N.W.
Washington, D.C. 20005
(202) 626-3600
gterwillger@whitecase.com

Counsel for Petitioner

APPENDIX

APPENDIX TABLE OF CONTENTS

Page

APPENDIX A: Opinion of the United States Court of Appeals for the Ninth Circuit 1a

APPENDIX B: Order of the Court of Appeals Denying Panel Rehearing and Rehearing *En Banc* 20a

APPENDIX C: Order of the Court of Appeals Granting Petitioner's Motion to Stay the Mandate 21a

APPENDIX D: Order of the United States District Court for the Central District of California Granting in Part and Denying in Part Defendant's Motion to Dismiss Indictment 22a

APPENDIX E: Indictment in the United States District Court for the Central District of California 37a

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-50296
D.C. No. 2:08-cr-00872-SJO-1
OPINION

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

PIERCE O'DONNELL,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Argued and Submitted
January 13, 2010—Pasadena, California
Filed June 14, 2010

Before: Alfred T. Goodwin, William C. Canby, Jr.,
and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Fisher

COUNSEL

George S. Cardona, Acting United States Attorney, Christine C. Ewell, Assistant United States Attorney, and Erik M. Silber (argued), Assistant United States Attorney, Los Angeles, California, for the plaintiff-appellant.

George J. Terwilliger III (argued), Daniel B. Levin, Darryl S. Lew and Michael H. Huneke, White & Case LLP, Washington, D.C., for the defendant-appellee.

Thomasenia P. Duncan, David Kolker, Kevin Deeley, Erin Chlopak and Steve Hajjar, Federal Election Commission, Washington, D.C., for amicus curiae Federal Election Commission.

Peter Ferrara, American Civil Rights Union, McLean, Virginia, for amicus curiae American Civil Rights Union.

J. Gerald Hebert, Paul S. Ryan and Tara Malloy, Campaign Legal Center, Washington, D.C.; Donald J. Simon, Sonosky, Chambers, Sachse, Endreson & Perry, LLP, Washington, D.C.; Fred Wertheimer, Democracy 21, Washington, D.C., for amici curiae Campaign Legal Center and Democracy 21.

Melanie Sloan, Citizens for Responsibility and Ethics in Washington, Washington, D.C., for amicus curiae Citizens for Responsibility and Ethics in Washington.

OPINION

FISHER, Circuit Judge:

Federal campaign finance law says that "[n]o person shall make a contribution in the name of another person." 2 U.S.C. § 441f. We hold that this law prohibits a person from providing money to others to donate to a candidate for federal office in their own names, when in reality they are merely "straw donors."

BACKGROUND

Defendant Pierce O'Donnell is alleged to have contributed $26,000 of his money in 2003 to the Edwards for President campaign through 13 individuals — primarily employees of his law firm as well as some of his relatives. According to the indictment, O'Donnell arranged for these individuals to donate $2,000 ostensibly in their own names but with the understanding that he would either advance them funds or reimburse them after the donation was made. In accord with these allegations, the grand jury charged O'Donnell with, *inter alia*, contributing in the names of others in violation of 2 U.S.C. § 441f. The district court dismissed the § 441f counts, and the government appeals. *See* 18 U.S.C. § 3731. We reverse.

Congress first enacted § 441f as part of the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), which was designed to regulate campaign finance by requiring the disclosure of contributions and their sources. In its present form, § 441f states: "*No person shall make a contribution in the name of another person* or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person." 2 U.S.C. § 441f (emphasis added); *see also* 11 C.F.R. § 110.4(b)(2) (applicable regulations).

In 1974, Congress also enacted a new provision, § 441a(a)(8), relating to the reinstatement of contribution limits. *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974). Section 441a(a)(8) states:

> For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

2 U.S.C. § 441a(a)(8). Although O'Donnell is not charged with violating § 441a(a)(8), it is relevant because the parties dispute whether and how its passage should influence our interpretation of § 441f.

STANDARD OF REVIEW

"We review de novo a district court's decision to dismiss an indictment based on an interpretation of a federal statute." *United States v. Marks*, 379 F.3d 1114, 1116 (9th Cir. 2004).

DISCUSSION

I.

The issue in this appeal is whether § 441f proscribes only "false name" contributions or, as the government contends, it also prohibits "straw donor" contributions. A false name contribution is a *direct* contribution from *A* to a campaign, where *A* represents that the contribution is from another person who may be real or fictional, with or without obtaining that person's consent. A straw donor contribution is an *indirect* contribution from *A*, through *B*, to the campaign. It occurs when *A* solicits *B* to transmit funds to a campaign in *B*'s name,

subject to *A*'s promise to advance or reimburse the funds to *B*. Although employing different methods, false name and straw donor schemes both facilitate attempts by an individual (or campaign) to thwart disclosure requirements and contribution limits. O'Donnell argues as a matter of statutory interpretation that § 441f cannot apply to straw donor contributions because, irrespective of *A*'s role in directing and reimbursing the money, the straw donor *B* has actually made the contribution, which is accurately reported in *B*'s name. We disagree.

Statutory interpretation begins with the text. *See N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). To put the language of § 441f in context, we also consider how related language is used in § 441a(a)(8). *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."). Finally, we analyze § 441f in light of its purpose of promoting disclosure and the broader structure of the Federal Election Campaign Act (FECA). *See Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir. 2003) (en banc) ("[T]he structure and purpose of a statute may also provide guidance in determining the plain meaning of its provisions."). Relying on these tools of interpretation, we hold that § 441f unambiguously applies to straw donor contributions.[1]

---

[1] The only court to have squarely addressed this issue concluded that § 441f applies to straw donor contributions. *See United States v. Boender*, ___ F. Supp. 2d ___, 2010 WL 725318 (N.D. Ill. Feb. 24, 2010). Numerous cases have assumed the same. *See, e.g., McConnell v. FEC*, 540 U.S. 93, 232 (2003), *over-*

A. The Text of § 441f

[1] Section 441f provides:

> No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

2 U.S.C. § 441f. Under O'Donnell's interpretation, only the person who personally transmits the contribution has actually made it. Therefore, § 441f is violated only if that person provides a false name. He argues that his alleged scheme, in contrast, did not violate § 441f because the straw donors actually transmitted the contributions, and they properly used their own names.

[2] The government agrees that false name contributions violate § 441f, but it argues that the language is sufficiently broad to reach straw donor contributions as well. Under the government's interpretation, the original source of funds has *made* the contribution even though it was actually transmitted by an intermediary, and if the intermediary is named as the source, the contribution has been made "in the name of another." The intermediary, in turn, having acted

---

ruled on other grounds by Citizens United v. FEC, 130 S. Ct. 876, 913 (2010); *United States v. Serafini*, 233 F.3d 758, 763 & n.5 (3d Cir. 2000); *United States v. Kanchanalak*, 192 F.3d 1037, 1042 (D.C. Cir. 1999); *Goland v. United States*, 903 F.2d 1247, 1251-54 (9th Cir. 1990); *FEC v. Weinstein*, 462 F. Supp. 243, 250 (S.D.N.Y. 1978). O'Donnell has not pointed us to a single counterexample. These decisions do not control our analysis, but the sheer consistency of their assumptions at the least undermines his argument that § 441f should *plainly* be read otherwise.

at the direction and used the funds of the original source, has not made a contribution, but instead has "knowingly permit[ted] his name to be used to effect such a contribution." There is no dispute that the contributions here were made in the names of O'Donnell's intermediaries. The only question is whether such attribution violated § 441f because it was O'Donnell who actually "made" the contributions.

[3] To determine which party in a straw donor scheme "make[s] a contribution," we first look to the statute to understand the meaning of that phrase. A contribution is statutorily defined as "any gift . . . of money . . . made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). The statutory definition clarifies what purpose is required for the gifts to be covered, and there is no dispute that the gifts here were made for the purpose of influencing the presidential primary election. The statutory definition, however, does not specifically address the salient question of *who* made the contributions. Therefore, we look next to the first dictionary definition of "contribute," which is "[t]o give or supply in common with others; give to a common fund or for a common purpose." *Am. Heritage Coll. Dictionary* 303 (3d ed. 2000). Applying that definition, it is clear that O'Donnell gave the money at issue for the common purpose of advancing the Edwards campaign.

[4] In ordinary usage, when Friend *B* delivers a gift that was provided by Friend *A*, we say that it was Friend *A* who gave that gift. In the context of gifts, the word "giving" connotes the idea of providing from one's own resources rather than simply conveying, and thus we refer to the original source rather than the intermediary as the one who gave. Section 441f

must be understood on this same common sense level. In a straw donor situation, the person who actually transmits the money acts merely as a mechanism, whereas it is the original source who has made the gift by arranging for his money to finance the donation. To identify the individual who has made the contribution, we must look past the intermediary's essentially ministerial role to the substance of the transaction. Accordingly, the statutory language applies when a defendant's funds go to a campaign either directly from him or through an intermediary. In either case, for purposes of § 441f, the defendant has made that contribution — and he has violated the statute if his own name was not provided as the source.[2]

O'Donnell argues that this interpretation illogically would result in criminalizing conduct when the intermediary is later reimbursed rather than at the time the money is delivered to the candidate's campaign. The concern, in other words, is that the defendant does not actually become the source — and thus no offense takes place — until the defendant reimburses the intermediary, after the donation (with its attendant reporting obligation) has already been made. Consequently, a contribution that was lawful at the time it was made would become unlawful based on subsequent events — a temporal sequence

---

[2] We need not decide whether and under what circumstances the intermediary should also be understood to have made a contribution, such that the intermediary's name must jointly be reported. We note, however, the Federal Election Commission regulation stating that when an intermediary exercises direction or control over a gift, the entire amount must be attributed to both the original source and the intermediary. *See* 11 C.F.R. § 110.6(d).

that seems anomalous should the language of § 441f be read as not concerned with anything that happens after the contribution is made.

We note preliminarily that this argument does not apply to the extent that O'Donnell was alleged to have advanced funds. When the funds are *advanced* rather than reimbursed, there is no timing anomaly: O'Donnell made the contributions at the moment they were transmitted to the campaign because he would already have supplied the necessary funds. With regard to reimbursed gifts, we acknowledge that the timing objection would be troubling (perhaps even decisive) when, for example, a defendant reimburses the contributions made by others without any prior arrangements or understandings. We therefore express no view on whether § 441f would apply to that hypothetical defendant. In the present circumstances, however, we reject O'Donnell's view that the contribution would not have been unlawful at the time it was made. When a defendant arranges to have an intermediary deliver a gift and promises reimbursement, the offense will at least have begun at the moment the contribution arrives at the campaign. Because the indictment alleges that O'Donnell then actually followed through with the reimbursements, we need not decide whether a subsequent failure to actually reimburse the intermediary would negate the offense. Our holding is limited to defendants who, as O'Donnell is alleged to have done, both prearrange for and follow through with the reimbursement of their intermediaries.[3]

---

[3] O'Donnell's timing argument fails for an additional reason based on § 441a(a)(8), which we discuss in section I.B *infra*.

[5] Considering the plain language of § 441f itself, therefore, we conclude that it encompasses straw donor contributions, whether accomplished through the advancement or reimbursement of funds. Because the context in which language is used is also relevant to plain meaning, we turn to O'Donnell's arguments based on § 441a(a)(8).

B. Reading § 441f in Light of § 441a(a)(8)

[6] O'Donnell argues that additional language in § 441a(a)(8) but not present in § 441f requires interpreting the latter provision as having a more limited scope, an argument the district court found persuasive. O'Donnell's argument focuses on two phrases in § 441a(a)(8):

> For purposes of the limitations imposed by this section, all contributions made by a person, *either directly or indirectly*, on behalf of a particular candidate, including *contributions which are in any way earmarked or otherwise directed through an intermediary or conduit* to such candidate, shall be treated as contributions from such person to such candidate.

2 U.S.C. § 441a(a)(8) (emphasis added). He argues that both of these italicized phrases would be unnecessary if the term "contribution" already encompassed indirect gifts delivered through an intermediary. From this language, he infers that "contribution," standing alone, must refer to *direct* contributions delivered without the use of an intermediary. Therefore, § 441f's use of "make a contribution" without any reference to intermediaries or conduits indicates that the provision is limited to false name contributions. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in

one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion and exclusion." (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) (internal quotation marks omitted) (alteration in original))).

O'Donnell's argument is unpersuasive for two reasons. First, Congress enacted § 441f and § 441a(a)(8) at different times, a fact that weakens the *Russello* presumption. *See Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1940 (2008) (explaining that the *Russello* presumption is " 'strongest' in those instances in which the relevant statutory provisions were 'considered simultaneously when the language raising the implication was inserted' " (quoting *Lindh v. Murphy*, 521 U.S. 320, 330 (1997))). We have applied the *Russello* presumption in at least one case in which the two provisions were not enacted at the same time. *See United States v. Youssef*, 547 F.3d 1090, 1094-95 (9th Cir. 2008) (per curiam). But in *Youssef*, the two provisions were more similar in purpose and structure, and these parallels made the absence of a particular word more telling than it otherwise would have been. *See id.*; *see also City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435-36 (2002) ("The *Russello* presumption . . . grows weaker with each difference in the formulation of the provisions under inspection.").[4] And even if the parallels were

---

[4] In *Youssef*, both statutes at issue prohibited false statements to government officials, and one included the word "materially" to modify "false" whereas the other did not. Relying in part on *Russello*, we declined to read a materiality requirement into the statute that omitted the modifier. *See Youssef*, 547 F.3d at 1094-95. In this case, as we explain further in section I.D *infra*, the two provisions share some overlap but

stronger, § 441f was passed three years earlier than § 441a(a)(8), so the choice of wording in the latter offers little insight into the meaning of the former. *See Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998) (declining to interpret provisions with reference to later enacted laws that did not, among other possibilities, "declare the meaning of earlier law" or "reflect any direct focus by Congress upon the meaning of the earlier enacted provisions").

Second, the *Russello* presumption applies with limited force here because the language used in § 441f is broad rather than specific. Section 441f does not, for example, include "directly" but omit the word "indirectly." Nor does § 441f specify a number of covered ways to "make a contribution" while omitting "conduit" from the list. In either of those situations, the absence of the words used in § 441a(a)(8) could indicate an intention to exclude their application in § 441f. But it makes less sense to draw that inference when, as here, the provision at issue uses broader language that encompasses the meaning of the absent words and thus did not need to expressly include them. *See Royal Foods Co., Inc. v. RJR Holdings, Inc.*, 252 F.3d 1102, 1107 n.6 (9th Cir. 2001) ("Merely because a statute's plain language does not specify particular entities that fall under its definition, does not mean that the statute is ambiguous as to all those who do fall under it.").

[7] The comparison to § 441a(a)(8) actually undermines O'Donnell's interpretation, because the language of that provision shows that indirect gifts are merely particular types of contributions, subsumed within

---

otherwise are less aligned in purpose and structure than the statutes in *Youssef*.

the general concept. If Congress had understood § 441a(a)(8) to reach more broadly than § 441f, there are several ways it could have so indicated. For example, § 441a(a)(8) could have referred to "contributions, which for purposes of this section include indirect gifts," a construction that would imply that the same word, used elsewhere, should not have that expanded meaning. Similarly, the provision could have referred to "contributions or conduit gifts," which would have suggested that conduit gifts are a distinct concept for which Congress would use a distinct term. Instead, § 441a(a)(8)'s identification of indirect or conduit gifts as particular types of contributions reinforces our conclusion that the unqualified term, standing alone, should be accorded its full range of meaning.

Finally, our examination of § 441a(a)(8) demonstrates that O'Donnell's timing argument regarding § 441f proves too much, because it would preclude liability for reimbursement schemes under the former provision as well. Central to O'Donnell's argument that § 441f does not reach his conduct is his contention that § 441a(a)(8) separately requires that intermediaries report the original source of the funds that they donate. He thus relies on § 441a(a)(8) to argue that his narrow reading of § 441f would not create a loophole for straw donor contributions. Yet both provisions are subject to the same concern about the timing anomaly created by reimbursed gifts. Although § 441a(a)(8) includes additional language regarding indirect contributions, it does not specifically acknowledge that a person who receives the original source's funds *after* transmitting a donation could still be considered an intermediary. Thus, the language of both provisions could be read to focus only on the moment a contribution is made, so they

would share the same supposedly anomalous feature of being dependent on the effect of subsequent events. If we agreed that O'Donnell's objection warranted excluding reimbursement schemes from the reach of § 441f, we would have to conclude that § 441a(a)(8)'s reference to indirect contributions similarly encompasses only funds that the original source has advanced to intermediaries. O'Donnell himself does not read § 441a(a)(8) in this manner, which reinforces our earlier conclusion that § 441f covers such reimbursement schemes so long as they have been prearranged and effectuated.

C. Purpose

An examination of statutory purpose reinforces our interpretation of the text. As noted earlier, Congress originally enacted § 441f as part of the Federal Election Campaign Act of 1971, which overall sought to regulate campaign finance through a regime of disclosure requirements. For example, in addition to § 441f's prohibition, the Act required campaigns to keep detailed information about all contributors who donated a minimum amount and to file regular public reports. *See* 2 U.S.C. §§ 432(c), 434(b) (1972). Simultaneously, the Act eliminated the individual contribution limits that had been in place under existing law. *See* 1971 FECA § 203, 86 Stat. at 9-10 (amending 18 U.S.C. § 608). Congress believed that full disclosure would make contribution limits unnecessary. *See* S. Rep. No. 92-229, at 122 (1971).

In this light, the congressional purpose behind § 441f — to ensure the complete and accurate disclosure of the contributors who finance federal elections — is plain. Our reading of the statute as applying to straw donor contributions is entirely consistent with this purpose, because such contributions undermine

transparency no less than false name contributions do by shielding the identities of true contributors. The same is true of our specific textual conclusion that O'Donnell *made* the contributions under § 441f, because it is implausible that Congress, in seeking to promote transparency, would have understood the relevant contributor to be the intermediary who merely transmitted the campaign gift.

Moreover, if § 441f were limited to false name contributions, then straw donor schemes would have been unregulated at least until 1974, when Congress adopted § 441a(a)(8). We think it highly unlikely that a Congress seeking to promote disclosure, and willing to eliminate contribution limits as an alternative means of regulating campaign finance, would have intended to leave out straw donor contributions, which were a recognized concern at the time. *See, e.g.*, Alexander Heard, *The Costs of Democracy* 359-60 (1960) (describing how "[d]ummy contributors" were used both to avoid disclosure as well as to evade contribution limits).

[8] To this reasoning, O'Donnell responds that Congress did leave a loophole in 1971, that the loophole was contrary to FECA's purpose and that Congress therefore closed the loophole by enacting § 441a(a)(8) in 1974. Thus, he contends, the enactment of § 441a(a)(8) confirms his interpretation of § 441f. We disagree. Section 441a and the 1974 amendments to FECA served primarily to reinstate contribution limits. *See* 1974 FECA § 101(a), 88 Stat. at 1263-64. There is nothing in the language of § 441a(a)(8) to indicate that the provision was directed at the disclosure concerns of § 441f. Indeed, had Congress been concerned about a loophole in § 441f, it likely would have amended that provision rather than

enacting § 441a(a)(8). Moreover, although § 441a (a)(8) requires the original source of funds to be reported, it addresses only the intermediary's obligations and not the principal offender in the straw donor scheme.[5] In contrast, § 441f under the government's interpretation properly criminalizes the conduct of both parties involved.

D. Structure

Although we reject O'Donnell's argument that § 441a(a)(8) was added to close a loophole for straw donor contributions, we acknowledge that the government's interpretation of § 441f does result in an overlap in FECA's present structure. Both provisions appear to require that a campaign contribution from A through B be reported as a contribution from A. The two provisions serve different purposes, however, making the overlap unsurprising — and legally insignificant. Congress enacted § 441a(a)(8) as part of its reinstatement of contribution limits. As noted above, the provision does not appear to be directed at § 441f's domain of criminalizing disclosure violations, but rather with providing guidance on accounting for purposes of calculating an individual's contribution totals. Given this fundamental difference in purpose, evident from the text of the provisions as well as the context in which they were passed, the overlap is less troublesome than it would be if the two provisions purported to address the same matter. *Cf. TRW Inc.*

---

[5] Although § 441a(a)(8) does not place reporting obligations on the original source, that source could violate 2 U.S.C. § 441a(a)(1)(A) by exceeding the individual contribution limit. Generally, violations of § 441a become felonies when the contributions total $25,000 during a calendar year, in contrast to the $10,000 threshold for violations of § 441f. *See* 2 U.S.C. § 437g(d)(1).

v. Andrews, 534 U.S. 19, 29-31 (2001) (rejecting an interpretation of a statute's general rule that would have rendered a listed exception superfluous, where both provisions addressed the same issue).

* * *

[9] In sum, the text, purpose and structure of § 441f all support the conclusion that the statute applies not only to false name but also to straw donor contributions. We therefore hold that § 441f unambiguously applies to a defendant who solicits others to donate to a candidate for federal office in their own names and either advances the money or promises to — and does — reimburse them for the gifts.

That conclusion forecloses O'Donnell's rule of lenity argument. "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion). Lenity does not, however, apply in the absence of a "grievous ambiguity," *Huddleston v. United States*, 415 U.S. 814, 831 (1974), that requires us to "guess as to what Congress intended," *Ladner v. United States*, 358 U.S. 169, 178 (1958). We are sensitive to the need to require fair notice to defendants, but here the statutory language, structure and purpose do not leave the provision's meaning "genuinely in doubt." *United States v. Otherson*, 637 F.2d 1276, 1285 (9th Cir. 1980); *see also Barber v. Thomas*, 560 U.S. ___, No. 09-5201, slip op. at 13-14 (2010). The fair notice concern seems especially inapposite in this case, because O'Donnell seeks to create a textually dubious loophole for himself by reading the two provisions to criminalize only the behavior of the accomplices who acted at his direction.

In any event, O'Donnell has at most shown that a narrower interpretation of § 441f is conceivable, but that is insufficient to establish ambiguity. *See Smith v. United States*, 508 U.S. 223, 239 (1993) ("The mere possibility of articulating a narrower construction . . . does not by itself make the rule of lenity applicable."); *Otherson*, 637 F.2d at 1285 ("[D]isputed words or phrases in criminal laws have in many instances been interpreted broadly, defeating defendants' claims." (citing *Huddleston*, 415 U.S. 814; *United States v. Cook*, 384 U.S. 257 (1966))). Thus, the rule of lenity does not apply.

II.

[10] Separately, O'Donnell argues that even if § 441f applies to straw donor contributions, the indictment against him is defective. "An indictment must be specific in its charges and necessary allegations cannot be left to inference . . . ." *Williams v. United States*, 265 F.2d 214, 218 (9th Cir. 1959). Moreover, "an indictment must do more than simply repeat the language of the criminal statute." *Russell v. United States*, 369 U.S. 749, 764 (1962). At the same time, an "indictment should be read in its entirety, construed according to common sense, and interpreted to include facts which are necessarily implied." *United States v. Givens*, 767 F.2d 574, 584 (9th Cir. 1985). We review the sufficiency of an indictment de novo. *United States v. Rodriguez*, 360 F.3d 949, 958 (9th Cir. 2004).

[11] O'Donnell argues that the indictment is inadequate because it charges him with reimbursing contributions made by others rather than with making contributions himself. By characterizing the indictment in this manner, he seeks to illustrate a "variance between the charged conduct and the charged statute." It is true that the indictment includes

allegations that O'Donnell reimbursed the contributions of others, which alone might not clearly state a legal violation. But the indictment also alleges that he "agreed to make conduit contributions . . . , that is, contributions in the names of others." Taken together, these allegations reasonably describe reimbursements as the particular method used to violate the ban on contributing in the names of others. The indictment is not defective.

CONCLUSION

We hold that § 441f prohibits straw donor contributions, in which a defendant solicits others to donate to a candidate for federal office in their own names and furnishes the money for the gift either through an advance or a prearranged reimbursement. We further hold that the indictment against O'Donnell is sufficient. Accordingly, the district court's order dismissing counts one and two of the indictment is reversed, and the case is remanded.

REVERSED and REMANDED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Dec 06 2010
Molly C. Dwyer, Clerk
U.S. Court of Appeals]

No. 09-50296
D.C. No. 2:08-cr-00872-SJO-1
Central District of California, Los Angeles

UNITED STATES OF AMERICA,
Plaintiff - Appellant,
v.

PIERCE O'DONNELL,
Defendant - Appellee.

ORDER

Before: GOODWIN, CANBY and FISHER, Circuit Judges.

The panel has voted to deny Appellee's petition for panel rehearing. Judge Fisher has voted to deny the petition for rehearing en banc, and Judges Goodwin and Canby so recommend.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and petition for rehearing en banc, filed June 28, 2010, is **DENIED**.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Dec 30 2010
Molly C. Dwyer, Clerk
U.S. Court of Appeals]

No. 09-50296
D.C. No. 2:08-cr-00872-SJO-1
Central District of California, Los Angeles

UNITED STATES OF AMERICA,
Plaintiff - Appellant,
v.
PIERCE O'DONNELL,
Defendant - Appellee.

ORDER

Before: GOODWIN, CANBY, and FISHER, Circuit Judges.

Appellee's motion to stay the issuance of the mandate for 90 days, filed December 7, 2010, is **granted**.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 08-00872 SJO

UNITED STATES OF AMERICA,
Plaintiff,

v.

PIERCE O'DONNELL,
Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS INDICTMENT [Docket No. 20]

This matter is before the Court on Defendant Pierce O'Donnell's Motion to Dismiss Indictment, filed March 16, 2009. Plaintiff United States of America (the "Government") filed an Opposition, to which O'Donnell replied. The Court held a hearing on this matter on June 2, 2009. Because of the following reasons, O'Donnell's Motion is GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

The Government alleges that O'Donnell and an unindicted co-conspirator acting at O'Donnell's instruction solicited individuals, including employees of O'Donnell's law firm, to contribute a total of over $10,000 in one year to "EFP," an authorized political committee supporting the election of a candidate for

President of the United States, and reimbursed their contributions. Based on these allegations, the Government indicted O'Donnell for: (1) conspiring to make illegal campaign contributions in violation of 18 U.S.C. § 371 and the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 441f ("Count One"); (2) making and causing to be made illegal campaign contributions in violation of 2 U.S.C. § 441f ("Count Two"); and (3) knowingly and willfully causing ESP's treasurer to make materially false statements in violation of 18 U.S.C. § 1001 ("Count Three").

O'Donnell now moves to dismiss on the grounds that the conduct alleged in Counts One and Two is not prohibited, and Count Three fails to allege the essential elements of the crime charged.

II. DISCUSSION

A. Counts One and Two Do Not Allege Prohibited Conduct.

"In all statutory construction cases, [courts] begin with the language of the statute. The first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.' The inquiry ceases 'if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (internal citations omitted). In determining the meaning of a statute, "it is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* at 452 (citing *Russello v. United States*, 464 U.S. 16,

23 (1983)) (explaining that "where Congress wanted to provide for successor liability in the Coal Act, it did so explicitly, as demonstrated by other sections in the Act that give the option of attaching liability to 'successors' and 'successors in interest. . . . If Congress meant to make a preenactment successor in interest like Jericol liable, it could have done so clearly and explicitly'"). In such situations, the Supreme Court has explained that "we refrain from concluding that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship." *Id.* Further, "it is a 'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Lastly, "deference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004).

1. 2 U.S.C. § 441f Is Unambiguous and Does Not Prohibit O'Donnell's Conduct.

Section 441f provides: "No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person." 2 U.S.C. § 441f. The term "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). In contrast,

§ 441a, which sets forth the maximum limits on contributions to a candidate or political committee, provides that for purposes of that section only, "all contributions made by a person, *either directly or indirectly*, on behalf of a particular candidate, including contributions which are in any way earmarked or *otherwise directed through an intermediary or conduit* to such candidate, shall be treated as contributions from such person to such candidate." 2 U.S.C. § 441 a(a)(8) (emphasis added). Similarly, Congress explicitly provided that for purposes of contributions or expenditures by national banks, corporations, or labor organizations, "the term 'contribution or expenditure' includes a contribution or expenditure, as those terms are defined in 2 U.S.C. § 431, *and also includes any direct or indirect payment* . . . or gift of money . . . or anything of value . . . ." 2 U.S.C. § 441b (emphasis added). Likewise, Congress specifically made it unlawful for "a foreign national, *directly or indirectly*, to make a contribution or donation of money or other thing of value." 2 U.S.C. § 441e(a)(1) (emphasis added).

The Government has charged O'Donnell with violating § 441f by soliciting and reimbursing his employees' contributions. (Indictment 4.) O'Donnell argues that § 441f prohibits only the act of making a contribution and providing a false name, not asking others to make contributions in their names and reimbursing them for it. (Def.'s Mem. P. & A. 4.) He points out that while Congress explicitly used the words "indirectly," "conduit" and "intermediary" in other parts of FECA, § 441f includes no such language. *See* 2 U.S.C. §§ 441a; b; e, f. Indeed, it appears that if Congress intended § 441f to apply to indirect contributions, or contributions made through a conduit or intermediary, it would have included

explicit language, as it did in other sections of the same statute. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. at 452. Moreover, if § 441f covered "conduit" and "indirect" contributions, there would be no need for Congress to have explicitly included those terms in other sections of FECA. As the Court should, whenever possible, interpret a statute so as not to render any of its terms superfluous, the better reading of § 441f is that it does not cover such contributions. *See TRW Inc.*, 534 U.S. at 31. Lastly, if § 441f covered indirect contributions made through a conduit, that would mean such contributions were never allowed. However, § 441a allows for indirect and conduit contributions, as long as they do not exceed designated limits. *See* § 441a. Thus, reading § 441f to prohibit such contributions is irreconcilable with § 441a's express authorization of them.

Indeed, the Government acknowledged the tension between § 441a and § 441f at oral argument, stating: "I do see the ambiguity that the Court's pointing to is that in one sense [FECA is] saying you have to report [an indirect contribution]. If you have to report it, then why is it something that 441(f) prohibits?" (June 2, 2009 Tr. 22:1-4.) The Government also stated that "I think if you disclosed [an indirect contribution] you might not run into trouble, because, again, there's no penalty—I mean there's no criminal sanction—for 441(f) until you reach over two thousand dollars. . . ." After the hearing, the Government filed a Supplement to Opposition in which it states that "[i]f a person makes a conduit contribution he has violated § 441f, regardless of the amount of the conduit contribution." (Pl.'s Supp. Opp'n 2.) In the Supplement, the Government analogizes the relationship between § 441a and § 441f to that between the tax code and Title 21. It notes that the tax code requires a drug

dealer to report income earned from selling cocaine, but that such sales are illegal under Title 21, and reasons that, similarly, § 441a requires one to report conduit contributions, while § 441f makes them illegal. *Id.* However, unlike the cocaine reporting requirements in the tax code and the separate criminalizing statute, the provisions regarding conduit contributions are found in different sections of the same statute. Because a statute must be construed as a whole, the Court must read § 441a and § 441f in a way that makes them consistent with one another, and with the rest of FECA. As explained above, the Government's proposed interpretation does not do this. Accordingly, analyzing the plain language of § 441f in the context of FECA as a whole, § 441f is unambiguous and does not prohibit soliciting and reimbursing contributions.

2. Even If § 441f's Plain Language Were Ambiguous, FECA's Legislative History and the Rule of Lenity Establish That § 441f Does Not Prohibit O'Donnell's Conduct.

a. FECA's Legislative History

Even if the language of § 441f were ambiguous, the legislative history of FECA suggests that Congress did not intend § 441f to cover indirect contributions. After § 441f was introduced, Senator Scott stated that a "loophole" existed in the campaign contribution laws because a "man of influence" could evade contribution limits by giving his friends money and having them contribute an equal amount to his campaign. 117 Cong. Rec. 29,295 (1971). If § 441f prohibited using one's friends as conduits for contributions, there would be no "loophole" to fill. In addition, § 441b's predecessor, 18 U.S.C. § 610, prohibited

contributions by national banks, corporations, and labor organizations. During debate on a proposed bill and amendment to add language defining "contribution" to "include any direct or indirect payment," Senator Hansen was asked whether an employee could make a contribution and be reimbursed by his corporate employer. Hansen replied that doing so "would constitute a violation of law . . . *as an indirect payment*." 117 Cong. Rec. 43,381 (1971) (emphasis added). Senator Hayes agreed. *Id.* This discussion demonstrates that Congress used the term "indirect" to cover reimbursements.

b. The Rule of Lenity

The rule of lenity "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (internal citations omitted). "[T]he rule applies 'for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute.'" *United States v. Devorkin*, 159 F.3d 465, 469 (9th Cir. 1998) (internal citations omitted). Here, the statute is unambiguous in light of its plain language, structure, and legislative history. However, assuming it remained ambiguous after such analyses, the rule of lenity would require the Court to interpret § 441f in O'Donnell's favor.

3. The Government's Remaining Arguments Are Unpersuasive.

The Government contends that "funneling money to another person (through either an advance or reimbursement) in order for that person to make a contribution is *basically* a contribution in the name of

another person," and that O'Donnell "*essentially* made a contribution in the name of another person." (Pl.'s Opp'n 5, 11 (emphasis added).) It notes that several courts, including the Ninth Circuit, have described § 441f as the section that "prohibits the use of 'conduits' to circumvent [FECA's] restrictions." *Goland v. United States*, 903 F.2d 1247, 1251 (9th Cir. 1990); *see also Mariani v. United States*, 212 F.3d 761, 766 (3d Cir. 2000) (describing § 441f as "the conduit contribution ban or 'anti-conduit' provision"). However, while these courts have described § 441f as pertaining to conduits in passing, they did so while addressing other aspects of FECA, and have not actually considered whether § 441f covers indirect contributions or reimbursements. In *Goland*, for example, Goland solicited and reimbursed contributions, and was charged with violating 2 U.S.C. §§ 441a and 441f. *See Goland*, 903 F.2d at 1252. The first criminal suit against him resulted in a mistrial, and he was re-indicted under § 441a but not 441f. *See United States v. Goland*, 897 F.2d 405, 407-408 (9th Cir. 1990); *United States v. Goland*, 959 F.2d 1449, 1451-52 (9th Cir. 1992). Judge Fletcher's comment describing § 441f as prohibiting conduits was in the context of Goland's civil suit challenging the constitutionality of FECA under the First Amendment, and thus Judge Fletcher was not presented the opportunity to consider whether § 441f prohibited reimbursements, but rather focused solely on the constitutionality of the law. *Id.* Because Judge Fletcher's statement, like that in *Mariani*, was a passing comment made in the course of considering a separate issue, rather than a holding made after analyzing § 441f in the context of reimbursements, these generalized statements are not persuasive on the matter at issue here.

The Government also argues that because the definition of contribution applicable to § 441f includes "anything of value made by any person for the purpose of influencing any election for Federal office," O'Donnell's reimbursements to his employees qualify as "things of value," and thus as contributions. However, if the reimbursement itself is the "contribution," O'Donnell did not "make a contribution in the name of another person," as he reimbursed the employees in his own name.

The Government notes that the Federal Election Commission ("FEC"), which provides civil enforcement of FECA, has issued a regulation concerning § 441f which states that "examples of contributions in the name of another include giving money or anything of value, all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of the money or the thing of value to the recipient candidate or committee at the time the contribution is made." 11 C.F.R. § 110.4(b)(2)(i). In addition, an FEC advisory opinion states that "the Act and Commission regulations prohibit the making and knowing acceptance of contributions in the name of another, and also prohibit the use of one's name to effect such a contribution. 2. U.S.C. § 441f; 11 C.F.R. 110.4(b). This includes the reimbursement or other payment of funds by one person to another for the purpose of making a contribution." FEC Advisory Opinion No. 1996-33, 1996 WL 549698. While these statements may reflect the spirit of FECA, they do not accord with the plain language of § 441f read in conjunction with the sections of FECA expressly prohibiting "conduit" and "indirect" contributions, as well as FECA's legislative history. Moreover, because the plain language, structure, and legislative history of FECA demonstrate

that "indirect" and "conduit" contributions are covered by other FECA sections but not by § 441f, deference to the FEC's interpretation is not warranted. *See Gen. Dynamics Land Sys.*, 540 U.S.at 600; *see also Ctr. for Biological Diversity v. Brennan*, 571 F. Supp. 2d 1105 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984)) (explaining that "under *Chevron*, a court defers to an agency's reasonable interpretation of a statute, if a statute is ambiguous, and if, after examining the statute using the 'traditional tools of statutory construction,' that ambiguity remains").

For the foregoing reasons, the Court finds that O'Donnell's conduct of reimbursing his employees for contributions they made does not fall within the ambit of § 441f, and thus GRANTS O'Donnell's Motion to Dismiss with regards to Counts One and Two.

B. Count Three Sufficiently States the Essential Elements of the Crime Charged.

Count Three alleges that O'Donnell "knowingly and willfully caused the treasurer of EFP . . . to make a materially false statement" that his employees had made contributions to EFP "when, in fact, as O'Donnell well knew, O'Donnell had made those contributions by providing his money to those individuals . . . to make those contributions." (Indictment 8.) O'Donnell alleges that this Count must be dismissed because: (1) it fails to allege the essential elements of a violation of 18 U.S.C. § 1001; and (2) EFP's statement to the FEC was "indisputably true." (Def.'s Mem. P. & A. 8.)

1. The Indictment Alleges the Essential Elements of a Violation of 18 U.S.C. § 1001.

O'Donnell argues that the Indictment's statement that he "knowingly and willfully" caused the false statements fails to allege the mens rea required to convict a person for causing a false statement in the context of FEC reporting. *Id.* at 9. He cites a Third Circuit case which required a heightened mens rea to be liable under § 1001 in conjunction with 18 U.S.C. § 2b, for causing another to make a false statement, rather than directly making the statement himself. *See United States v. Curran*, 20 F.3d 560, 570-571 (3d Cir. 1994). In *Curran*, the Third Circuit held that a defendant must: (1) know that the treasurer had a legal duty to report the actual source of contributions; (2) have acted with the specific intent to cause the treasurer to submit a report that did not accurately provide the relevant information; and (3) have known that his actions were unlawful. *Id.* The *Curran* court reached this conclusion after noting that there was no "controlling case law expounding the proper construction of willfulness required for a charge under § 2b linked with § 1001 in a [FECA] case." *Id.* at 568. It analogized to *Ratzlaf v. United States*, 114 S. Ct. 655 (1994), in which the defendant was accused of structuring cash deposits to evade the federal regulation requiring banks to report amounts deposited in excess of $10,000. The Supreme Court held that the jury instructions were incorrect because they failed to state that the prosecution must show the defendant knew the structuring was unlawful. *Curran*, 20 F.3d at 568 (citing *Ratzlaf*, 114 S. Ct. at 663). Relying on *Ratzlaf*, the *Curran* court found jury instructions incorrect that "failed to state that the government had the burden of proving that defen-

dant knew of the campaign treasurers' obligation to submit contribution reports to the [FEC]." *Id.* at 570.

The D.C. Circuit has expressly rejected the Third Circuit's heightened mens rea requirement and instead held that the mens rea for § 1001 requires only that "the defendant knew the statements to be made were false" and "the defendant intentionally caused such statements to be made by another." *United States v. Hsia*, 176 F.3d 517, 522 (D.C. Cir. 1999). In *Hsia*, the court explained that *Curran's* reliance on *Ratzlaf* was flawed. It noted that *Ratzlaf* "did not universalize a broad reading of 'wilfully' and thus overturn the general rule that ignorance of the law is no excuse. *Ratzlaf* found a knowledge-of-criminality requirement in a statute that independently required the act at issue to be 'for the purpose of evading' various reporting requirements; reading 'wilfully violating' there as only requiring intention would have made it surplusage. In [cases brought under § 1001 and § 2b], no such problem exists." *Id.* (citing *Ratzlaf*, 114 S. Ct. at 658).

While the Ninth Circuit has not considered the issue of § 1001 violations in the FEC reporting context, it has held in other contexts that "the mens rea needed to violate § 1001 [requires] only that the defendant act 'deliberately and with knowledge.'" *United States v. Kim*, 95 Fed. Appx. 857, 861 (9th Cir. 2004) (citing *United States v. Heuer*, 4 F.3d 723, 732 (9th Cir. 1993) ("to willfully make a false statement under § 1001, the defendant must have the specific intent to make a false statement")); *see also United States v. Dominguez-Mestas*, 687 F. Supp. 1429, 1433 (S.D. Cal. 1988) (explaining that for conviction under § 1001, the prosecution must prove the intent element by showing "that the defendant knew the

statement was untrue"). In regards to other statutes requiring willfulness, the Ninth Circuit has explained: "the Supreme Court has recognized that 'the word willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears." *United States v. Henderson*, 243 F.3d 1168, 1171-72 (9th Cir. 2001) (citing *Bryan v. United States*, 524 U.S. 184, 191 (1998). "Often, in the criminal context, 'in order to establish a 'willful' violation, the Government must prove that the defendant acted with knowledge that his conduct was unlawful. In particular, proof of knowledge of unlawfulness is required when the criminal conduct is contained in a regulation instead of in a statute, and when the conduct punished is not obviously unlawful, creating a 'danger of ensnaring individuals engaged in apparently innocent conduct'." *Id.* at 1172 (internal citations omitted.)

Here, the conduct proscribed is contained in a statute, not a regulation. In addition, requiring a defendant to know the statements are false and intentionally cause someone to make them is a sufficient safeguard against punishing purely innocent conduct. Moreover, the Court agrees with the D.C. Circuit's analysis of § 1001 and rejection of the Third Circuit's heightened mens rea requirement. *See Hsia*, 176 F.3d at 522. Thus, the Government satisfies its burden of proving a § 1001 violation by showing that O'Donnell knew the statements to be made were false and intentionally caused such statements to be made by another. *See id.* Accordingly, the Indictment here, which alleges that O'Donnell acted "knowingly and willfully," sufficiently states the essential element of mens rea for a § 1001 and § 2b violation.

2. The Statements at Issue Are Not "Indisputably True".

O'Donnell argues that the Court must dismiss Count Three because he has a complete defense to § 1001 liability in that the EFP treasurer's statement to the FEC was "indisputably true." (Def.'s Mem. P. & A. 11.) FECA requires treasurers to report to the FEC "the identification of each person . . . who makes a contribution to the reporting committee . . . whose contribution(s) have an aggregate amount or value in excess of $200 within the calendar year." 2 U.S.C. § 434(b)(3)(A). O'Donnell argues that FECA requires reporting of the names of those who actually tender funds to a campaign committee, not the "original source" of those funds, and thus the EFP treasurer's statements were literally true. (Def.'s Mem. P. & A. 12-13.)

Once again, the Ninth Circuit has not considered this issue. However, other courts that have considered the issue have held that "§ 434(b) of FECA requires political committees to report the 'true source' of hard money contributions; thus, statements identifying conduits as the source of funds were not 'literally true.'" *United States v. Kanchanalak*, 192 F.3d 1037, 1042 (D.C. Cir. 1999) (citing *Hsia*, 176 F.3d at 523-24) (explaining that "as in *Hsia*, defendants are alleged to have acted as conduits or utilized others in making contributions to political committees in federal elections. By thus causing political committees to report conduits instead of the true sources of donations, defendants have caused false statements to be made to a government agency").

O'Donnell cites no authority holding otherwise. Accordingly, the EFP treasurer's statements were not "indisputably true," and the Court will not dismiss the Indictment on this ground.

III. RULING

For the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART Defendant's Motion to Dismiss the Indictment. Counts One and Two are hereby DISMISSED.

IT IS SO ORDERED.

Dated: June 8, 2009

/s/ S. JAMES OTERO
S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
June 2007 Grand Jury

[Filed 07/24/08]

CR08-00872

UNITED STATES OF AMERICA,
Plaintiff,

v.

PIERCE O'DONNELL,
Defendant.

INDICTMENT

[18 U.S.C. § 371: Conspiracy; 2 U.S.C. §§ 437g(d), 441f: Illegal Campaign Contributions; 18 U.S.C. § 1001: False Statement; 18 U.S.C. § 2(b): Causing an Act to be done]

The Grand Jury charges:

GENERAL ALLEGATIONS

At all times relevant to this Indictment:

A. Federal Election Laws

1. The Federal Election Campaign Act ("FECA") governed candidates for Federal office and the political committees that received contributions on their behalf.

2. FECA defined "Federal office" as the office of President or Vice President of the United States or Senator or Representative in the United States Congress.

3. FECA defined "political committee" as a committee, club, association or other group of persons that receives contributions aggregating in excess of $1,000 during a calendar year or that makes expenditures aggregating in excess of $1,000 during a calendar year.

4. FECA defined "election" to include a general, special, primary, or runoff election and a convention or caucus of a political party with authority to nominate a candidate.

5. FECA defined "principal campaign committee" as a political committee designated and authorized by a candidate for Federal office. FECA required that a candidate for Federal office designate a principal campaign committee.

6. Under FECA, a candidate for Federal office who received contributions or made disbursements for his or her campaign was deemed an agent of the candidate's authorized political committee(s).

7. FECA required each political committee to have a treasurer who was required to file periodic reports with the Federal Election Commission identifying, among other things, persons whose contributions aggregated in excess of $200 within the calendar year (or per election cycle in the case of authorized committees of a candidate for Federal office) by name, address, and occupation and the contributions provided by those contributors by date and amount.

8. FECA defined a "contribution" as, among other things, any gift, loan, advance, or deposit of money or

anything of value made by any person for the purpose of influencing any election for Federal office.

9. FECA defined an "authorized committee" as the principal campaign committee or any other political committee authorized, in writing, by a candidate for a Federal office to receive contributions or make expenditures on behalf of such candidate.

10. FECA prohibited the following:

a. An individual from making a contribution, or contributions, that in the aggregate exceeded $2,000, to any candidate and the candidate's authorized political committees with respect to any election for federal office; and

b. An individual from making a contribution in the name of another person or knowingly permitting his name to be used to effect such a contribution (the person in whose name such a contribution is made is known as a "conduit contributor").

B. Parties and Entities

11. EFP was an authorized political committee of a candidate for Federal office.

C. Incorporation By Reference

12. These General Allegations are incorporated by reference into each and every count of this Indictment.

COUNT ONE

[18 U.S.C. § 371, 2 U.S.C. §§ 437g(d), 441f]

A. THE OBJECT OF THE CONSPIRACY

Beginning in or after February 2003 and continuing to on or about April 21, 2003, in Los Angeles County, within the Central District of California,

defendant PIERCE O'DONNELL ("O'DONNELL"), unindicted co-conspirator D.V., and others known and unknown to the Grand Jury, knowingly and willfully conspired and agreed to make conduit contributions that aggregated more than $10,000 within a calendar year, that is, contributions in the names of others, in violation of 2 U.S.C. §§ 437g(d) and 441f.

B. MEANS BY WHICH THE OBJECT OF THE CONSPIRACY WAS TO BE ACCOMPLISHED

1. Defendant O'DONNELL would solicit individuals to make contributions to EFP, and would inform such individuals that he would reimburse their contributions.

2. Defendant O'DONNELL would instruct and cause unindicted co-conspirator D.V. to solicit employees of his law firm and other individuals to make contributions to EFP that he would reimburse.

3. Defendant O'DONNELL and unindicted co-conspirator D.V. would inform prospective conduit contributors that they would be reimbursed for their contributions to EFP.

4. Defendant O'DONNELL and unindicted co-conspirator D.V. would collect and receive contributions to EFP from the individuals who they solicited (hereafter the "conduit contributors") and cause their contributions to be received by EFP.

5. Unindicted co-conspirator D.V. would write out and defendant O'DONNELL would sign bank checks drawn on the account of defendant O'DONNELL reimbursing the conduit contributors for their contributions to EFP.

6. Unindicted co-conspirator D.V. would deliver bank checks drawn on defendant O'DONNELL'S account and signed by defendant O'DONNELL in

order to reimburse the conduit contributors for their contributions to EFP.

C. OVERT ACTS

From on or about March 1, 2003 through on or about April 21, 2003, in furtherance of the conspiracy and to accomplish the object of the conspiracy, defendant O'DONNELL, unindicted co-conspirator D.V., and others known and unknown to the Grand Jury, committed and caused to be committed various overt acts in Los Angeles County and elsewhere, within the Central District of California, including, but not limited to, the following:

1. Unindicted co-conspirator D.V. solicited M.S. to make a contribution to EFP.

2. Unindicted co-conspirator D.V. solicited H.S. to make a contribution to EFP.

3. Defendant O'DONNELL and unindicted co-conspirator D.V. caused H.E. to make a $2,000 contribution to EFP.

4. Defendant O'DONNELL and unindicted co-conspirator D.V. caused B.R. to make a $2,000 contribution to EFP.

5. Defendant O'DONNELL and unindicted co-conspirator D.V. caused E.L. to make a $2,000 contribution to EFP.

6. Defendant O'DONNELL caused M.O. to make a $2,000 contribution to EFP.

7. Defendant O'DONNELL caused H.W. to make a $2,000 contribution to EFP.

8. Unindicted co-conspirator D.V. wrote out a bank check bearing number 2444 in the amount of $8,000 drawn on defendant O'DONNELL'S bank account in order to reimburse conduit contributions to EFP.

9. Defendant O'DONNELL signed a bank check bearing number 2445 in the amount of $4,000 drawn on defendant O'DONNELL'S bank account in order to reimburse conduit contributions to EFP.

10. Defendant O'DONNELL caused a bank check bearing number 2446 to be issued in the amount of $4,000 drawn on defendant O'DONNELL'S bank account in order to reimburse conduit contributions to EFP.

11. Unindicted co-conspirator D.V. wrote out a bank check bearing number 2448 in the amount of $4,000 drawn on defendant O'DONNELL'S bank account in order to reimburse conduit contributions to EFP.

12. Defendant O'DONNELL signed a bank check bearing number 2450 in the amount of $2,000 drawn on defendant O'DONNELL'S bank account in order to reimburse a conduit contribution to EFP.

COUNT TWO

[2 U.S.C. §§ 441f, 437g(d); 18 U.S.C. § 2(b)]

On or about the dates listed below, in Los Angeles County, within the Central District of California, defendant PIERCE O'DONNELL, through his agents and employees, knowingly and willfully made, and caused to be made, contributions in the names of other persons that aggregated more than $10,000 during the 2003 calendar year. More specifically, defendant O'DONNELL knowingly and willfully caused other persons to contribute to EFP, an authorized political committee supporting the election of a candidate for President of the United States, and advanced to those persons and reimbursed those persons a total of more than $10,000 for their contributions:

Date	Contribution Amount	Conduit Contributor
3/27/03	$2,000	B.R.
3/27/03	$2,000	R.V.
3/31/03	$2,000	E.L.
3/31/03	$2,000	A.L.
3/31/03	$2,000	J.F.
3/31/03	$2,000	R.F.
3/31/03	$2,000	J.R.
3/31/03	$2,000	C.A.
3/31/03	$2,000	H.E.
3/31/03	$2,000	E.O.
3/31/03	$2,000	M.O.
3/31/03	$2,000	H.W.
3/31/03	$2,000	G.W.

COUNT THREE

[18 U.S.C. § 1001; 18 U.S.C. § 2(b)]

In or about April 2003, in Los Angeles County, within the Central District of California, in a matter within the jurisdiction of the executive branch of the Government of the United States, namely, the Federal Election Commission, defendant PIERCE O'DONNELL knowingly and willfully caused the treasurer of EFP, an authorized political committee supporting the election of a candidate for President of the United States, to make a materially false statement, namely, that certain individuals, including B.R., H.E., and E.L., had each made a $2,000 contribution to EFP, when, in fact, as defendant

O'DONNELL well knew, defendant O'DONNELL had made those contributions by providing his money to those individuals, including B.R., H.E., and E.L., to make those contributions.

A TRUE BILL

/s/
Foreperson

THOMAS P. O'BRIEN
United States Attorney

[Illegible]

[Illegible]

CHRISTINE C. EWELL
Assistant United States Attorney
Chief, Criminal Division

JOSEPH O. JOHNS
Assistant United States Attorney
Chief, Environmental Crimes Section

DENNIS MITCHELL
Assistant United States
Attorney Environmental Crimes Section